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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1107

SELECT MINORITY TRUST, Sub nom.
INA BELLE THOMPSON AND B. D. WHITE,
Administrators of the ESTATE OF
I. W. THOMPSON, ET AL.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No.

SOUTH MISSOURI TRUST, Sub nom.
INA BELLE THOMPSON AND R. D. WHITE,
Administrators of the ESTATE OF
I. W. THOMPSON, ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 14, 1970, Petition for Rehearing denied September 15, 1970.

OPINIONS BELOW

The opinion of the District Court (Appendix A, *infra*, pp. A-1-A-16) is not officially reported, but it is unofficially reported at 69-1 USTC ¶9269. The opinion of the Court of

Appeals (appendix B, *infra*, pp. B-1–B-7) is officially reported at 430 F. 2d 388 and unofficially reported at 70-2 USTC ¶9516.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1970 (Appendix B, *infra*, p. B-9), and the Petition for Rehearing was denied September 15, 1970 (Appendix B, *infra*, p. B-11). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the District Court's conclusion that under all the facts and circumstances it was not unreasonable that the Select Minority Trust's funds were accumulated and not distributed during all the years in question was clearly erroneous.

STATUTE INVOLVED

The pertinent statutory provision is 26 U.S.C., Section 504(a)(1) as follows:

> SEC. 504. DENIAL OF EXEMPTION.
>
> (a) General Rule.—In the case of any organization described in section 501(c)(3) to which 503 is applicable, exemption under section 501 shall be denied for the taxable year if the amounts accumulated out of income during the taxable year or any prior taxable year and not actually paid out by the end of the taxable year—
>
> (1) are unreasonable in amount or duration in order to carry out the charitable, educational, or other purpose or function constituting the basis for exemption under section 501(a) of an organization described in section 501(c)(3); . . .

This section of the Internal Revenue Code of 1954 was repealed by P.L. 91-172, effective for taxable years beginning after December 31, 1969.

STATEMENT

This is a civil case; a suit for refund of income taxes instituted in the District Court pursuant to 28 U.S.C. Sections 1340 and 1346(a)(1) by I. W. Thompson and wife, Charlie Thompson, Individually, and I. W. Thompson as Trustee of the Select Minority Trust. Both I. W. Thompson and wife, Charlie Thompson, have died since instituting the action and their personal representatives have been substituted. The Government counterclaimed against Select Minority Trust for income taxes for the years 1957 and 1958, pursuant to the provisions of 28 U.S.C. Sections 1345 and 1346(c) and Rule 13 of the Federal Rules of Civil Procedure. The District Court ruled in favor of all taxpayers, including Select Minority Trust, the Petitioner herein. From that judgment the Government appealed only that part favorable to Select Minority Trust and the Court of Appeals for the Fifth Circuit reversed and remanded on the basis that the District Court's decision was clearly erroneous.

The case was submitted to the District Court on a joint stipulation of facts, the pleadings and briefs. The crucial facts are that at the beginning of the tax year 1957, I. W. Thompson, who died in February, 1965, was a farmer, 78 years of age, living in the rural community of Van, Texas. His wife, Charlie Thompson, who died in December, 1967, was 72 years of age in 1957 and had been substantially blind since prior to 1949. The Thompsons had no children, and through the years in question lived very simple, frugal lives.

On September 19, 1949, I. W. Thompson executed a trust instrument establishing a trust known as Selected Minority Funds (now known as Select Minority Trust) and named himself as Trustee. The purpose of the trust was to provide educational funds for deserving college students. The trust instrument espoused a personal philosophy of Mr. Thompson favoring a form of democratic socialism and an aversion to the use of intoxicating liquor and tobacco. This was one of the keys to the difficulty which Mr. Thompson encountered in attempting to disburse funds of the trust for scholarships. Throughout the period of the existence of the trust up until the year 1955, Mr. Thompson attempted to establish a working relationship with one or more colleges or universities, such as East Texas State Teachers College, Commerce, Texas, whereby the trust funds would be used for scholarships for college students. Thompson's attempts, as Trustee, to effectuate his plan for distributing the trust's funds in the aforesaid manner met with no success due largely to the controversial nature of the economic philosophy embraced in the trust instrument itself.

Then, in 1955, prior to the tax years here in controversy, i.e., 1957 and 1958, Mr. Thompson interrupted his efforts to distribute the trust's funds for educational purposes because the Internal Revenue Service launched a determined effort to establish that the trust did not exist for tax purposes and that the income of the trust should be taxed to Mr. and Mrs. Thompson, individually. This effort on the part of the Government failed for the tax years 1952 through 1956 (209 F. Supp.530 (E.D. Tex. 1962), rev'd on other grounds 332 F. 2d. 657 (5th Cir. 1964)), and since it neither appealed

the adverse decision in the earlier case nor in this case, it is presumed that the effort to tax Mr. and Mrs. Thompson, individually, on the income of the trust has been abandoned. However, after losing the first case, the Government filed its counterclaim in the instant case against Select Minority Trust on the grounds that the trust had accumulated its income and failed to distribute same unreasonably and that, therefore, its exemption from income taxation was lost. The District Court held that under all the facts and circumstances it was not unreasonable that the trust's funds were accumulated and not distributed during all the years in question, but the Court of Appeals found this holding to be clearly erroneous.

REASONS FOR GRANTING THE WRIT

A manifest injustice will occur if the Court of Appeals' decision is permitted to stand. It is submitted that this Court should right that injustice because under all the facts and circumstances of this case it was not unreasonable that the trust's funds were not distributed during the years in question. Mr. Thompson was aged and infirm and unsophisticated in matters of income tax and private philanthropy. When the Government attacked the trust as nonexistent for tax purposes, he resolved to dedicate all of his efforts to resisting this attack after which he would resume the carrying out of the trust's purposes.

It is admitted that the Government had the burden of proving that the trust unreasonably accumulated its funds during the tax years in question. Further, it is undisputed that the failure to distribute the funds of the trust in 1957

and 1958 was due to the Government's attack on the existence of the trust. Under the circumstances, Thompson, as Trustee, did not know what he had to offer colleges and universities and prospective recipients of scholarships and would not know until the controversy with the Government was resolved. With the matter in that posture, it is submitted that no trustee would have acted properly if he had distributed the trust's funds under the circumstances that existed in 1957 and 1958.

In 1958, one of the years involved in this litigation, the Government dramatically demonstrated the potency of its attack on the trust by levying on the trust's bank accounts and collecting $171,665.65 as income taxes, penalties and interest alleged to be due from Mr. Thompson and his wife, individually, for the years 1952 through 1956. And, at the time, they were making the same contention as to the years 1957 and 1958.

It is abundantly clear that during this period the Government never mentioned that, as Trustee, Thompson should be distributing the trust's funds rather than accumulating them. Quite the contrary, in 1957 and 1958 the Internal Revenue Service in effect, was telling Thompson he had better not distribute the trust's funds because they were going to be needed to pay his individual income taxes and then made good on that threat in 1958.

Remembering that the Government had the burden of proof in this case, it is submitted that something more than a difference of opinion between the Court of Appeals and the District Court should be present before the District

Court's decision is held to be clearly erroneous. Since the death of Mr. Thompson, the trust has fully functioned as a general educational trust providing financial assistance to worthy and deserving young people in securing a college education. An adverse decision in this lawsuit will drastically reduce the trust's capacity to accomplish its charitable purposes. It would truly be regrettable that this should happen principally because of a distaste for Mr. Thompson's personal philosophies. Moreover, it is much too late to reconstruct Mr. Thompson, himself, since he is long since deceased. The real losers will be the young people who cannot be served by this educational trust because a substantial part of its funds have ended up in the Treasury's coffers.

It is earnestly submitted that under all the facts and circumstances it was not unreasonable that the trust's funds were not distributed during the years in question, and that the District Court's decision to that effect is not clearly erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Allen E. Pye
J. Robert Dobbs, Jr.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that service of three copies of this Petition for Writ of Certiorari has been made on the Solicitor General, Department of Justice, Washington, D. C. 20530, by Air Mail, in accordance with the rules of the Supreme Court of the United States.

Dated:.....day of December, 1970.

Allen E. Pye

Attorney for Petitioner

APPENDIX A

FILED
Jan. 15, 1969
James R. Cooney, Clerk, U. S. Court
By MARGARET DRIVER
Deputy

In the
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
Tyler Division

Civil No. 3032

INA BELLE THOMPSON and B. D. WHITE, Administrators of the Estate of I. W. THOMPSON, TOMMIE S. RILEY and CHRISTINE HENLEY, Independent Executrices of the Estate of CHARLIE THOMPSON; and THOMAS W. HATHAWAY, NANCY L. JAMES, and J. HAROLD STRINGER, Trustees, SELECT MINORITY TRUST

v.

UNITED STATES OF AMERICA

HONORABLE ALLEN E. PYE
HONORABLE J. ROBERT DOBBS, JR.
433 Citizens First Nat'l Bank Bldg.
Tyler, Texas 75701
For the Plaintiffs

HONORABLE ROBERT L. TRIMBLE
Department of Justice, Tax Division
7-A-06 Federal Building
Fort Worth, Texas 76102
For the Defendant

This civil action has been brought by the plaintiffs for a refund of income taxes for the years 1957 and 1958. The defendant has counterclaimed against Select Minority Trust and its trustees for income taxes for the same years asserting that should the Court find the individual taxpayers not liable, the trust itself should be held liable for the taxes assessed because of unreasonable accumulation of income.[1]

Plaintiffs maintain that all issues except that relating to reasonableness of the accumulation of income have been decided in favor of the taxpayers in a case involving the same parties and issues for the years 1952 through 1956. *Thompson v. United States*, 209 F.Supp. 530 (1962); 332 F. 2d 657 (5th Cir. 1964), and therefore the defendant is collaterally estopped from raising such issues in this case. These issues[2] are: (1) Whether the settlors were taxable on the trusts' income by virtue of having reatined sufficient control over the trust to render the income taxable to them?[3] (2) Whether settlors were taxable on the income of the trust because the property conveyed to the trust might revert to settlors?[3] (3) Whether the trust was created and operated exclusively for charitable or educational purposes and thus exempt from income taxes?[4] The defendant denies that it is collaterally estopped to raise these issues because the fact that different tax years are involved constitutes a change of circumstances making collateral estoppel inapplicable.

This case has been submitted for determination on a joint stipulation of facts. The court having carefully considered

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[1] Internal Revenue Code, 1954 §504(a).

[2] cf. Internal Revenue Code, 1954 §§671, 674 and 676.

[3] cf. Treasury Regulations 118 (1939 code) §39.22(a)-21(c).

[4] cf. Internal Revenue Code (1954) §501(c)(3).

said stipulation, the pleadings and briefs filed by the parties, does hereby make the following Findings and Conclusions:

FINDINGS OF FACT

I.

At the beginning of the tax year 1957, I. W. Thompson, who died in February, 1965, was a farmer, 78 years of age, living in the rural community of Van, Texas. His wife, Charlie Thompson, who died in December 1967, was 72 years of age in 1957, and had been substantially blind since prior to 1949. The Thompsons had no children, and through the years in question, lived very simple, frugal lives. Both were under the usual disabilities of their ages throughout the periods involved.

II.

On September 19, 1949, I. W. Thompson, referring to himself as donor, executed a trust instrument establishing a trust known as Selected Minority Funds (now known as Select Minority Trust), hereinafter referred to as the trust, and named himself as Trustee. Under the terms of the trust instrument, he named himself as trustee and retained broad powers with respect to its administration, including the selection of its beneficiaries and the payment or withholding of payment of trust funds to beneficiaries. He also reserved a broad power to amend the Trust, subject to the limitation that it could not be changed to the extent that it ceased to be an "educational" trust.[5] The trust instrument is duly recorded in the Deed Records of Van Zandt County, Texas, Vol. 508, p. 595.

---

[5]The trust instrument was amended in 1959, after the years involved herein, but the amendment did not change the character of the Trust.

In September 1951, I. W. Thompson and wife, Charlie Thompson, executed a deed conveying to I. W. Thompson, trustee for the Selected Minority Funds, nine-tenths (9/10ths) of all of the oil, gas and other minerals in and under approximately 86 acres of land in the highly productive Van Field in Van Zandt County, Texas. The fair market value of this interest, on the date of transfer, was not less than $650,000. Cost depletion, using this value, would be about 40 percent during each of the years involved herein. The deed transferring this interest is duly recorded in the Deed Records of Van Zandt County, Texas, Vol. 397, p. 511.

IV.

From and after the effective date of said deed, namely, June 1, 1951, the oil and gas royalties attributable to the mineral interest conveyed by said deed were paid to the trust.

V.

I. W. Thompson and wife, Charlie Thompson, duly filed joint income tax returns for each of the years involved in this action, but since they did not consider the income paid to the trust as income accruing to them, they did not include said income, which was a substantial amount, in their returns. Furthermore, since they did not regard the trust as a taxable trust, they did not file an income tax return on behalf of the trust for any of the years involved.

VI.

The Internal Revenue Service disagreed with the position of the Thompsons that the income paid to the trust was not taxable to them individually and that the trust was tax

exempt and, after a complete investigation, made deficiency assessments against the Thompsons, individually, totaling $30,588.55 for the year 1957 and $17,379.05 for the year 1958.

VII.

I. W. Thompson and wife did not voluntarily pay the deficiencies assessed and they were, therefore, collected by levy on the bank account or accounts of I. W. Thompson and Charlie Thompson, individually, on September 20, 1960.

VIII.

I. W. Thompson and wife, Charlie Thompson, filed timely claims for refund of the aforesaid taxes, penalty and interest for the years 1957 and 1958, which claims for refund were rejected by letter dated August 4, 1961.

IX.

The taxes involved in the plaintiffs' suit for refund arose primarily by virtue of the commissioner's inclusion in the taxable income of I. W. Thompson and Charlie Thompson, individually, of income from the mineral interest referred to hereinabove in paragraph III, which was paid to the trust. The taxes involved in defendant's counterclaim against the trust are a result of the Commissioner's determination that the trust was not tax exempt during the years 1957 and 1958 and was, therefore, taxable on the income received by it during those years.

X.

The trust has never made any distributions of funds to any beneficiaries. All contacts with colleges or other insti-

tutes of higher learning, in an effort to distribute the funds of the trust, were confined to the period prior to 1956. The trust's gross income, expenses, purchases and total accumulation of income at the end of the year for each of the years 1951 through 1956 are set out in the schedule attached to the Stipulation as Exhibit D.

XI.

Sometime prior to 1957, an agent of the Internal Revenue Service made an examination of the tax returns of I. W. Thompson and wife, Charlie Thompson, for the tax years 1952 through 1956, and an investigation of the liability of the Thompsons for income taxes for those years. In the course of this examination and investigation, the agent contacted I. W. Thompson and discussed with him the trust, its provisions and the failure of the Thompsons to report as income to them the income of the trust.

As a result of that examination, the Commissioner of Internal Revenue assessed against the Thompsons taxes, penalties, and interest in the aggregate amount of $171,665.65 for the years 1952 through 1956. This assessment was collected by levy on the bank accounts of I. W. Thompson and Charlie Thompson and on the bank account of the trust.

XII.

Subsequently, I. W. Thompson and wife, Charlie Thompson, individually, and I. W. Thompson, Trustee for Selected Minority Funds, filed suit against the United States of America in the United States District Court for the Eastern District of Texas, Tyler Division, Civil Action No. 2881, for

refund of income taxes, penalties, and interest for the years 1952 through 1956, inclusive. That suit, involving the years 1952 through 1956, inclusive, was ultimately determined favorably to the taxpayers, as reflected in the official reports of the District Court's decision at 209 F.Supp. 530, and the Court of Appeals for the Fifth Circuit at 332 F. 2d 657.

XIII.

Subsequent to the death of I. W. Thompson, Wilford Thompson, as Administrator of the Estate of I. W. Thompson, deceased, filed suit against the trust in the District Court of Van Zandt County, Texas, in which he sought to recover all of the properties of the trust. The said cause was settled without trial and an agreed judgment dated December 20, 1966 was entered wherein, among other things, the trust was left with $500,000 cash or cash equivalent and no other property.

XIV.

Also, subsequent to the death of I. W. Thompson, the then trustees of the trust filed a suit in the District Court, Seventh Judicial District, Smith County, Texas, for construction of the trust instruments and for instructions.

XV.

As a result of the revisions made to the trust instrument by the court in Cause No. 65-287A, in the Seventh Judicial District Court, Smith County, Texas, the Internal Revenue Service, on December 26, 1967, ruled that the trust is exempt from federal income taxation commencing January 1, 1967.

XVI.

At all times pertinent to this action, the trust was organized and operated exclusively for educational purposes.

XVII.

At all times pertinent hereto I. W. Thompson, trustee of the trust, had a plan or plans to use the trust's fund exclusively for educational purposes, which plan was to establish a working relationship with one or more colleges or universities such as East Texas State Teachers College, Commerce, Texas, whereby the trust's funds would be used for scholarships for college students.

XVIII.

Thompson, as trustee, attempted to effectuate his plan for distributing the trust's funds in the aforesaid manner but his efforts to do so met with no success due to the controversial nature of the economic philosophy espoused in the trust instrument itself.

XIX.

Prior to the tax years here in controversy, Mr. Thompson interrupted his efforts to distribute the trust's funds for educational purposes because the Internal Revenue Service launched a determined effort to establish that the trust did not exist for tax purposes and that the income of the trust should be taxed to Mr. and Mrs. Thompson, individually.

XX.

Under all the facts and circumstances it was not unreasonable that the trust's funds were accumulated and not distributed during all the years in question.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction over the parties and the subject matter of this litigation.

II.

The decisions of this Court and the Court of Appeals for the Fifth Circuit, in the case of *Thompson v. United States*, 209 F. Supp. 530 (1962), and 332 F. 2d 657 (1964), collaterally estop the defendant from challenging the tax exempt status of the trust for the years 1957 and 1958 or from contending that its income is taxable to the individual plaintiffs, I. W. Thompson and Charlie Thompson. *Tait v. Western Maryland Railway Co.*, 289 U.S. 620 (1933); *Commissioner v. Sunnen*, 333 U.S. 591 (1948); Moore's Federal Practice, Vol. 1B par. 0.422[1].

III.

Under the holding and judgment in Civil Cause No. 2881, decided earlier by this Court, and the undisputed facts in this case, as a matter of law, the trust did not lose its exemption from income taxation during the years 1957 and 1958 by virtue of not having been "operated exclusively" for charitable purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1954.

IV.

Nor did the trust lose its exemption from income taxation by virtue of having, during 1957 and 1958 and years prior

thereto, an accumulation of income which was unreasonable in amount and/or duration to carry out the charitable purposes of the trust within the meaning of section 504 of the Internal Revenue Code of 1954.

V.

Judgment will be entered that the estates of I. W. Thompson and Charlie Thompson have and recover from the United States of America, defendant, the sum of $47,967.60 together with interest thereon in accordance with law, and for costs and disbursements of this action.

VI.

Judgment should be entered that the United States of America, defendant, have and take nothing by virtue of its counterclaim against the Select Minority Trust.

ENTERED this 15th day of January, A.D., 1969.

Original signed by
Joe J. Fisher

United States District Judge

APPENDIX B
In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27994

INA BELLE THOMPSON and B. D. WHITE,
Administrators of the Estate of I. W. THOMPSON, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas

(July 14, 1970)

Before RIVES, GEWIN and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: In this income tax refund suit, the estates of I. W. Thompson and Charlie Thompson, his wife, sought refund of federal income taxes for the years 1957 and 1958 in the amount of $47,967. In defending, the United States asserted a counterclaim for federal income taxes for the same years in the amount of $43,544.62 against

the "Select Minority Trust", established by and having as its sole trustee, I. W. Thompson.

The district court, sitting without a jury, entered judgment for the estates on the refund suit and in favor of the "Select Minority Trust" on the government's counterclaim. The United States appeals only that portion of the judgment entered in favor of the Trust.

In 1949, I. W. Thompson established a trust known as "Selected Minority Funds"[1] and appointed himself as sole trustee. The purpose of the trust fund was to provide aid to deserving college students who, in order to qualify as beneficiaries, must declare a belief in democratic socialism and agree to refrain from the use of intoxicating liquor and tobacco.

Under the terms of the trust instrument, Thompson retained broad powers with respect to its administration, including the power to select beneficiaries, to withhold payment of trust funds to beneficiaries, and to amend the trust, subject only to the limitation that it could not be changed to the extent that it ceased to be an "educational trust".

In 1951, the Thompsons executed a deed conveying to I. W. Thompson, Trustee, 9/10 of all oil, gas, and other minerals in and under approximately 86 acres of land in the productive Van field in Van Zandt County, Texas. The fair market value of this interest on the date of transfer was not less than $650,000. The oil and gas royalties attributable

[1]The costs instrument was subsequently amended in 1959 and the name changed to "Select Minority Trust". The amendments as made did not change the nature or character of the trust and as such, do not concern us here.

to the mineral interest so conveyed were thereafter paid to the trust.

In 1955, the trust purchased real estate in Van, Texas upon which there were to be erected business and residential rentals units, but such plans never reached fruition.

The trust above described has never made any distribution of funds to any beneficiaries since its creation. All contacts with colleges or other institutions of higher learning, in an effort to distribute the funds of the trust, were confined to the period prior to 1956, and all such efforts met with failure.

I. W. Thompson and his wife, Charlie Thompson, duly filed joint income tax returns for each of the years in question but since they did not consider the income paid to the trust as income accruing to them personally, they did not include that income in their individual returns. Moreover, since they did not regard the trust as a taxable trust, they did not file an income tax return on behalf of the trust for any of the years involved.

The Internal Revenue Service rejected the position taken by the Thompsons and after a complete investigation, made deficiency assessments against the Thompsons, individually, totaling $30,588.55 for the year 1957 and $17,379.05 for the year 1958. Failing voluntary payment of the deficiencies assessed, collection was made by levy on the bank accounts of I. W. Thompson and Charlie Thompson, individually.[2]

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[2]A similar investigation, deficiency assessment and levy occured for the tax years 1952-1956 which was litigated and ultimately decided in the Thompsons' favor. 209 F. Supp. 530 (E.D. Tex. 1962), rev'd on other grounds, F. 2d 657 (5th Cir. 1964). As is true in the instant case, the government did not appeal that portion of the judgment which found that the trust income was not taxable to I. W. Thompson or Charlie Thompson, individually.

The sole issue on appeal and that which forms the underlying predicate of the government's counterclaim in the court below is whether the trust in question unreasonably accumulated income during the years 1957 and 1958 so as to lose the status of exemption from taxation pursuant to Sec. 504(a)(1) of the I.R.S. Code of 1954 (26 U.S.C. sec. 504(a)(1)). We conclude that the district court's determination that the trust did not unreasonably accumulate income within the meaning of Sec. 504(a)(1) of the Code is clearly erroneous and that portion of the judgment must be reversed and the case remanded for entry of judgment for the United States on its counterclaim.

Title 26 U.S.C. Sec. 504(a)(1) provides in pertinent part as follows:

> Sec. 504 Denial of Exemption
> (a) General rule— . . . , [E]xemption under section 501 shall be denied for the taxable year if the amounts accumulated out of income during the taxable year or any prior taxable year and not actually paid out by the end of the taxable year—
>
> > (1) are unreasonable in amount or duration in order to carry out the charitable, educational, or other purpose or function constituting the basis for exemption under section 501(a) . . .

In the Thompsons' previous litigation of this trust for the taxable years 1952-1956, the district court held that the trust was exempted from taxation under Sec. 501 of the Code since it was established and created for educational purposes. The government did not appeal that portion of the district court's decision, nor does it appeal the district court's ruling here, that the trust income is not taxable to the Thompsons

individually or to the estate. Instead, the government seeks to overturn the district court's determination that the trust did *not* unreasonably accumulate income within the meaning of Sec. 504(a)(1) of the Code. The issue of unreasonable accumulations of income was not involved in *Thompson v. United States, supra,* for that case concerned taxation of trust income to the donor/settlor under Secs. 674 and 676 of the Code. Because the instant appeal is founded upon a wholly separate section of the Code and for different taxable years, the doctrines of res judicata and collateral estoppel are not applicable. See *Commissioner v. Sunnen,* 333 U.S. 591 (1948).

The basis of the finding by the district court that the accumulation was not unreasonable was that Thompson was "interrupted" in his efforts to distribute the funds due to the government's attack upon the validity of the trust for tax purposes. The district court further found that the Thompsons had a "plan" for the distribution, although it is admitted that the plan was never implemented in that no funds were ever in fact distributed.

The government contends that the district court's finding that the accumulations were not unreasonable is clearly erroneous because: (1) the trust never distributed any of the funds; (2) the trust, contrary to the district court's finding, had no "plan" under which income accumulations were required to meet the educational goals for which it received its tax exempt status; (3) the terms of the trust made it nearly impossible to execute. Because the government has injected the issue via counterclaim, it must bear the burden

of proving unreasonableness. *United States v. Molitor*, 337 F. 2d 917, 922 (9th Cir. 1964).

In determining the reasonableness of accumulations for Sec. 504 purposes, the court may properly look to see if the trust has a concrete program for accumulation of income and whether the program is reasonable from a practical standpoint. Both present and past operations of the trust are to be properly considered in judging the reasonableness of the accumulations. See *Danforth Foundation v. United States*, 347 F. 2d 673, 676 (8th Cir. 1965), *cert. denied*, 382 U.S. 955 (1965); *Stevens Brothers Foundation, Inc. v. C.I.R.*, 324 F.2d 633, 639 (8th Cir. 1963), *cert. denied*, 376 U.S. 969 (1963). See also, *Curt Teich Foundation v. C.I.R.*, 48 T.C. 963, 975 (1967), *aff'd*, 407 F.2d 815, 816 (7th Cir. 1969).

The trustee's claim that income was not distributed because of the government's pending actions is without merit. The government did not attack the trust's accumulation of income prior to 1957, yet since its establishment in 1949, no distribution of funds has occurred. Moreover, all attempts at finding beneficiaries appear to have ceased after 1955. The appellees' argument in this respect, as well as the district court's decision, runs counter to the purpose and intent of Sec. 504—to force distribution of accumulated income within a reasonable time.

Part of the purported "plan" of the trust was to accumulate enough income to interest colleges in the possibility of administering the grants. When weighed against the record of accumulations, this attempted justification rings hollow. It cannot be said that the trust was required to accumulate

over $500,000 of income over and above the principal investment of $650,000 in order to interest colleges in administering grants of not more than a few thousand dollars. This is especially true in view of the fact that the trust had enough assets to purchase a sizeable tract of land in 1955 upon which it proposed to erect commercial buildings. In further attestation of the conclusion that such enormous accumulations over a nine year period were unreasonable is the fact that there is serious doubt that the trust was objectively capable of being fulfilled. This stems not only from the requirements imposed upon any potential beneficiary, but from the vast discretionary powers retained by the trustee. There is no better weather vane of future fulfillment or capability of fulfillment than the past record. The trustee admits that all colleges contacted have refused the grants. While this standing alone will not invalidate the trust, it will provide a basis for forcing the trust to disgorge some of its accumulated income. The accumulation of income as to both time and amount was not justified for it was not based upon a "rational total program of charitable intent". *Erie Endowment v. United States*, 316 F.2d 151, 155 (3rd Cir. 1963).

The district court's conclusion that the government's "attack" upon the status of the trust not only justified withholding income after 1956, but also justified the nondistribution of funds prior to that year is clearly erroneous and fails to recognize the manifest purpose for which Sec. 504(a)(1) of the Code was enacted.

REVERSED and REMANDED with directions.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27994

D. C. Docket No. CA 3032

INA BELLE THOMPSON and B. D. WHITE,
Administrators of the Estate of I. W. THOMPSON, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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Before
RIVES, GEWIN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District

Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded with directions to the said District Court in accordance with the opinion of this Court.

It is further ordered that the plaintiffs-appellees pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

July 14, 1970

Issued As Mandate:

U. S. Court of Appeals
FILED
SEP 15 1970
Edward W. Wadsworth
Clerk

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 2779

INA BELLE THOMPSON and B. D. WHITE,
Administrators of the Estate of I. W. THOMPSON, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Apellant.

Appeal from the United States District Court for the Eastern District of Texas

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(September 15, 1970)

ON PETITION FOR REHEARING

Before RIVES, GEWIN and INGRAHAM, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1107

SELECT MINORITY TRUST, SUB NOM. INA BELLE THOMPSON AND B. D. WHITE, ADMINISTRATORS OF THE ESTATE OF I. W. THOMPSON, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on July 14, 1970 (Pet. App. B9–B10), and the petition for rehearing was denied on September 15, 1970 (Pet. App. B11). The 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) expired on December 14, 1970, and no extension of time was granted. The petition was filed on December

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15, 1970. Since the 90-day time limitation is jurisdictional, the petition is untimely and should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

U. S. GOVERNMENT PRINTING OFFICE: 1971